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**BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20554**

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**NOV 21 2002**

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of	)	DA 02-2063
	)	
Amendment of Section 73.202(b),	)	MM Docket No. 01-104
Table of Allotments, FM Broadcast Stations	)	RM-10103
(Auburn, Northport, Tuscaloosa, Camp Hill,	)	RM-10323
Gardendale, Homewood, Birmingham, Dadeville,	)	RM-10324
Orrville, Goodwater, Pine Level, Jemison, and	)	
Thomaston, Alabama	)	
To: Media Bureau		

**REPLY TO OPPOSITION TO  
PETITION FOR RECONSIDERATION**

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**November 21, 2002**

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Preston W. Small (Mr. Small), by his attorney, hereby replies to his November 8, 2002 *Opposition to Petition for Reconsideration*. In reply thereto, the following is respectfully submitted:

**A. Mr. Small's Right Participate and to File a Reply**

1) 47 C.F.R. § 1.429(g) provides that “replies to an opposition shall be filed within 10 days after the time for filing oppositions has expired and need be served only on the person who filed the opposition.” Nothing in the rule prevents the party which filed the opposition from filing reply comments and nothing in the rule provides that “reply” comments must oppose, rather than support, the opposition. Indeed, 47 C.F.R. § 1.4(h) contemplates that “all parties” to a proceeding are entitled to file a response to a document which has been served in the proceeding. 47 C.F.R. § 1.400 provides that one becomes a “party” to a rulemaking proceeding through the filing of, *inter alia*, properly served “responsive pleadings.” Because Mr. Small filed a properly served opposition in the instant proceeding, he is a “party” in the instant proceeding with the right to reply.

2) The Commission has explicitly held that in FM allocation proceedings a “party” is not required to have “an economic stake in the proceeding or . . . an intention to file a license application;” the Commission’s policy is “to consider all comments and proposals timely received in the course of rule making proceedings.” *Amendment of Section 73.606(b), Table of Assignments, Television Broadcast Stations (Hampton-Norfolk-Portsmouth-Newport News, Virginia)*, 53 R.R.2d 53 ¶ 7 (Pol. Rules Div. 1983). Relying upon § 1.400, the Commission determined that “in rule makings, the common definition of ‘interested person’ should be applied – that is, one who is interested in the proceeding.” *Id.* The precedent cited above fully supports Mr. Small’s right to

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<sup>1</sup> The Commission established the reconsideration rule found at § 1.429 in *Amendment of procedures for Reconsideration of Actions in Notice and Comment Rulemaking Proceedings, Memorandum Opinion and Order*, 57 F.C.C.2d 699 (FCC 1975). In ¶ 2 of that order the Commission determined that the rulemaking reconsideration provision found at § 1.429, unlike reconsideration pursuant to § 1.106, does not require that a new participant show cause why participation could not have commenced at an earlier time.

participate in the instant proceeding via opposition after learning of Petitioners' *ex parte* comments which attacked Mr. Small's interests at issue in MM Docket **98-112** thereby causing Mr. Small to become "interested." Because Mr. Small is properly considered a party in the instant proceeding, and because § 1.429 does not prohibit any particular party from filing a reply, and because Mr. Small must be provided a fair opportunity to present his case in the instant proceeding, Mr. Small has a regulatory as well as a due process right to submit a reply in this proceeding.'

### **B. Petitioners' *Ex Parte* Violation**

3) At pages **4-6** of the *Opposition* Petitioner filed in Docket No. **98-112** Petitioners' claims that they did not violate the *ex parte* rules in the instant restricted proceeding when they argued that "the filing of four petitions for reconsideration by Preston Small in the Anniston/College Park Proceeding constitutes a very unique abuse of the FCC processes . . . [T]o allow the filing of a fourth

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<sup>2</sup> The instant reply is timely filed. § 1.420(f) required that Mr. Small's *Opposition* be served on the parties to the proceeding and the *Opposition* was served upon WNNX et al. by mail on November 8, 2002, the last day to file oppositions. 67 Fed. Reg. **65354** (October **24**, 2002). 47 C.F.R. § 1.429(g) provides that replies to an opposition must be filed "within 10 days after the time for filing oppositions has expired," that *is*, by November 18, 2002. 47 C.F.R. § 1.4(h) provides that if the Commission's rules require service of a document, and if the document is served by mail "and the filing period for a response is 10 days or less, an additional 3 days (excluding holidays) will be allowed to all parties in the proceeding for filing a response." Thus, the reply filing date in this proceeding is November 21, **2002**. "All parties" to the proceeding get the benefit of the three mailing days, even if a particular party is not served by mail, provided that at least one party to the proceeding has been served by mail, and Mr. Small is entitled to the benefit of the three mailing days. See § **1.4(h)**; *Amendment of Section 1.4 of the Commission's Rules Relating to Computation of Time, Memorandum Opinion and Order*, 11 FCC Rcd **3059** ¶ 5 (FCC **1996**).

<sup>3</sup> Petitioners stated in their November 8, **2002 Consolidated Opposition**, ¶ 10, MM Docket **98-112**, that Petitioners have no problem with Mr. Small responding to the *ex parte* presentations made in the instant proceeding in Mr. Small's reply to be filed in MM Docket **98-112**. Moreover, Petitioners state that "Radio South *had to* . . . discuss this [MM Docket 98-112] proceeding" in the subject *Petition. Consolidated Opposition*, MM Docket **98-112**, ¶ 9 (emphasis supplied by WNNX). Clearly Petitioners consider the two proceedings related and have linked them together and Mr. Small cannot be criticized for holding a similar view. In view of the fact that the illegal *ex parte* comments were made in the instant proceeding, in view of Petitioners' view that the two proceedings are related, and in view of the fact that Petitioners do not mind that Mr. Small's response to the *ex parte* statements are presented in the context of a reply pleading, it does not appear that Petitioners can reasonably complain about Mr. Small's response in the instant reply.

petition for reconsideration to thwart the provision of first local service to four new communities disserves [sic] the public and essentially elevates and condones this sort of behavior.” See October 9, 2002 *Petition for Reconsideration of Cox Radio, Inc., CXR Holdings, Inc., and Radio South, Inc.*, at 9-10 (the pleadings reveal that Mr. Lipp is counsel to both WNNX in MM Docket 98-112 and to Radio South, Inc. the instant proceeding). In footnote 21 of the subject *Petition* Petitioners argue that Mr. Small’s *Petition for Reconsideration* in MM Docket 98-112 is “meritless” and that the Commission had changed its rules for the purpose of preventing the filing of pleadings such as Mr. Small’s “meritless” petition.

4) A prohibited *ex parte* presentation is a communication made to decision making Commission personnel which is directed to the “merits or outcome of a proceeding,” but which is not served upon parties to the proceeding. 47 C.F.R. § 1.1202(a),(b),(c). 47 C.F.R. § 1.1208 provides that “proceedings involving amendments to the broadcast table of allotments,” like the instant one, and like MM Docket 98-112, are “restricted” and *ex parte* communications are prohibited. It is settled Commission law that an expression of support for one side to a proceeding which is made without the knowledge of the other side is an illegal *ex parte* presentation. *Rainbow Broadcasting Company*, 13 FCC Rcd. 21000 ¶ 14 (FCC 1998).

5) On October 9, 2002 Petitioners filed the above quoted arguments against Mr. Small’s interests in the instant proceeding without service upon the undersigned or Mr. Small. Petitioners’ statements not only show support for WNNX’s position in MM Docket No. 98-112, the comments attack Mr. Small’s very right to participate in MM Docket 98-112. It cannot be disputed that WNNX’s counsel, and thus WNNX,<sup>4</sup> as the former chief of the Commission’s section responsible

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<sup>4</sup> Under longstanding Commission rule WNNX’s counsel’s improper activities *are* properly imputed to the principal, WNNX. *Carol Sue Bowman*, 6 FCC Rcd. 4723 ¶ 4 (FCC 1991); *Hillebrand Broadcasting Corp.*, 1 FCC Rcd. 419, 420 n. 6 (FCC 1986). There is no reason to believe that Petitioners were unaware of their counsels’ improper activities and, as explained in

(continued...)

for handling amendment of FM table of allotments, is well aware of the prohibition on *ex parte* communications in FM allocation proceedings and that he has been aware for many years of the penalty for violating the rule. *See Vero Beach, Florida, Notice of Proposed Rule Making*. 3 FCC Rcd. 1632 ¶ 13 (Lipp, Chief, Policy and Rules Division 1988) (Mr. Lipp instructs the public that “any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding.”). WNNX and RSI have long opposed Mr. Small’s efforts to obtain relief in MM Docket 98-112 and the opposition to Mr. Small which Petitioners expressed in the instant proceeding cannot be construed as “incidental” nor “inadvertent.” The appropriate penalty in a rulemaking proceeding for an *ex parte* violation is refusal to consider the violator’s comments and the Commission should debar Petitioners and their counsel from further participation in MM Docket 98-112 as well as MM Docket 01-104.

6) Petitioners November 8, 2002 *Consolidated Opposition* filed in MM Docket 98-112 WNNX serves up several explanations as to why they should not be considered to have violated the *ex parte* rules. Notably missing from this excuse list is any clear statement that they were unaware of their counsels’ activities in MM Docket 01-104 and it must be reasonably concluded that Petitioners had actual knowledge of their counsels’ activities in MM Docket 01-104.<sup>5</sup> None of

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<sup>4</sup>(...continued)

Section C of Mr. Small’s November 8, 2002 *Opposition to Petition for Reconsideration*, MM Docket 01-104, the facts reveal that Petitioners are working in concert to obtain mutually beneficial relief through various rulemaking proceedings. Even if Petitioners were unaware of their counsels’ efforts to advance their cause through *ex parte* communications, it is Petitioners’ responsibility to choose their counsel with care.

<sup>5</sup> Petitioners acknowledge that they may have violated the *ex parte* rules when they argue that Mr. Small has a remedy because Mr. “Small is aware of the Radio South filing, and if he has any substantive comments to offer, he has an opportunity to do so, since the Commission’s rules grant him a period in which to reply in this proceeding.” *Consolidated Opposition*, MM Docket 98-112, ¶10. However, Petitioners’ reliance upon the happenstance of Mr. Small discovering Petitioners’ *ex parte* presentation cannot save them -- determining whether an *ex parte* violation occurred cannot turn upon whether the injured party discovers the *ex parte* violation else the

(continued...)

Petitioners' excuses holds water. Petitioners asserts that the statements made in MM Docket 01-104 were "filed with the Secretary of the Federal Communications Commission" and not with a decision-maker and "this fact, in itself, removes it from the scope of the *ex parte* rules." *Consolidated Opposition*, MM Docket 98-112, at 6. Not only is this argument lame on its face, it contains a deliberately false and misleading statement. Petitioners' argument is lame on its face because the *Petition* filed in the instant proceeding was not intended for review by the Commission's Secretary, it was intended to be reviewed by decision-makers. Petitioners' argument contains deliberately false and misleading information because the *Petition* at issue instantly is expressly directed to the "Chief, Media Bureau," certainly a decision-maker.

7) Petitioners seeks refuge in a misreading *KMAP, Inc.*, 72 F.C.C.2d 241 (FCC 1979).<sup>6</sup> *Consolidated Opposition*, MM Docket 98-112, ¶ 9. *KMAP, Inc.* does not determine that pleadings filed through the Secretary's office are exempt from the *ex parte* restriction. ¶ 22 of *KMAP, Inc.* shows that the questionable communication was "filed with the Secretary of the Commission and initially processed by the Broadcast Bureau's Complaints and Compliance Division." Neither of these Commission offices were decision makers in the underlying proceeding at issue in the *KMAP, Inc.* case so the questionable communication was not made to "decision-making personnel." *KMAP, Inc.*, ¶ 26. Instantly, Petitioners' *ex parte* presentation in the subject *Petition* is directed to the "Chief, Media Bureau." The Chief is unarguably "unseparated Bureau or Office staff considered

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<sup>5</sup>(...continued)  
prohibition ~~is~~ hollow.

<sup>6</sup> Each of the cases upon which Petitioners rely to justify their *ex parte* violation predate two significant rewrites of the *ex parte* rules by the Commission. *See Report and Order*, 2 FCC Rcd. 3011 (FCC 1987) (¶ 1--a "sweeping review"); *Report and Order*, 12 FCC Rcd. 7348 (FCC 1997) (¶ 2--the new rules "are simpler and clearer, and thus more effective in ensuring fairness in Commission proceedings."). Whether viewed under the old rules as Petitioners prefer, or under the new rules, Petitioners' excuses do not carry the day.

decision-making personnel with respect to decisions, rules, and orders in which their Bureau or Office participates in enacting, preparing, or reviewing.” 47 C.F.R. § 1.1202(c).<sup>7</sup>

8) Rulemaking documents, whether or not *ex parte*, must be filed through the Secretary’s office, *see* 47 C.F.R. § 1.401(b); § 1.429(h); *see also* § 1.4(f). 47 C.F.R. § 1.1208 provides that “proceedings involving amendments to the broadcast table of allotments” are “restricted.” There is nothing in the rules suggesting that parties are able to make *ex parte* presentations concerning the merits of restricted FM allocation proceedings and there is nothing in the rules which suggests that Mr. Small must sit in the Secretary’s office to examine the contents of each filing which passes through that office to determine whether a party is arguing against Mr. Small’s interests in MM Docket 98-112. Petitioners’ position that the Commission does not intend to apply the *ex parte* prohibition to FM allocation proceedings merely because the *ex parte* presentation is filed through Secretary’s office is absurd as it substantially eviscerates the *ex parte* prohibition.

9) A prohibited *ex parte* presentation is a communication made to decision-making Commission personnel which is directed to the “merits or outcome of a proceeding,” but which is not served upon parties to the proceeding. 47 C.F.R. § 1.1202(a),(b),(c). Even though Petitioners claim a right to argue against Mr. Small’s protected interests in “a different, unrelated proceeding,” *Consolidated Opposition*, MM Docket 98-112, ¶ 9, there is no license in the Commission’s *ex parte* presentation definitions for Petitioners to make their case against Mr. Small in the instant restricted proceeding. Petitioners’ comments in the subject *Petition* are clearly directed to the “merits or outcome of a proceeding,” that is, MM Docket 98-112, and the comments were not served upon Mr. Small nor the undersigned. Petitioners’ *Consolidated Opposition* in MM Docker 98-112 does not

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<sup>7</sup> The Commission has not separated the Media Bureau in either proceeding.



argue that the offending comments made in the instant proceeding do not evidence support for WNNX and opposition to Mr. Small and the *ex parte* violation is clear.<sup>8</sup>

10) Speaking for Radio South, Inc. in MM Docket 98-112, WNNX claims that Mr. Small's interests in the instant proceeding may be attacked in the context of another restricted proceeding because a

"presentation" does *not* include a report required by the Commission's rules. . . . Radio South *had* to file its petition for reconsideration or lose its rights, and in doing so had to discuss this proceeding because the instant proceeding was the reason its rule making was dismissed.

Consolidated Opposition, at ¶ 9 (emphasis added by WNNX).<sup>9</sup> Petitioners' emphasis on certain of their own words does not excuse Petitioners from the *ex parte* restriction. First, the subject *Petition* is not a report required by the Commission's rules, but a voluntarily submitted argument. Second, Petitioners' claim that the subject *Petition* "*had*" to attack Mr. Small's interests in MM Docket 98-112 is false. The subject *Petition*, at 10, states that

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<sup>8</sup> Even the cases upon which Petitioners rely in their Consolidated Opposition, MM Docket 98-112, ¶ 9, fully support this conclusion. The Commission long ago determined that while the *ex parte* "rules" should not be construed as an absolute bar to such communication [dealing with general industrial problems], . . . they do bar *ex parte* communications dealing directly with the merits of the restricted proceeding." Report and Order, 1 F.C.C. 2d 49 ¶23 (FCC 1965); *see also* Midwest Television, Inc., 8 F.C.C.2d 1131 ¶ 4 (FCC 1967) (discussion of general policy matters not prohibited); *American Television Relay, Inc.*, 9 F.C.C.2d 1004 ¶11 (FCC 1967) ("counsel for parties (in the same manner as parties themselves) are 'entitled to pursue other legitimate interests before the Commission, but must not use the pendency of other matters as a pretext for *ex parte* communications going to the merits or outcome of a restricted proceeding'" citing 1 F.C.C.2d 49 ¶ 25). While Petitioners consider their *ex parte* attack against Mr. Small's interests to be "normal," Consolidated *Opposition*, MM Docket 98-112, n. 11, Petitioners' use of the instant proceeding to attack Mr. Small's procedurally protected position is clearly illegal because Petitioners' communication does not concern broadcasting generally, but is a pointed attack against Mr. Small's very right to participate in MM Docket No. 98-112. Undersigned counsel is unaware whether Petitioners have made similar attacks in other proceedings, and Petitioners have not indicated whether other *ex parte* comments have been made; Mr. Small requests that the Commission review its pending case load in Georgia and neighboring states to see if any such attacks have been made,

<sup>9</sup> WNNX's ability to speak for RSI evidences an undisclosed relationship between WNNX and RSI.

should the Division determine that *Cut and Shoot* is applicable, it should carve out a very narrow exception to *Cur and Shoot* in recognition of the unusual, special facts of this case where, but for an abuse of process in another rulemaking proceeding, Cox's and Radio South's Counterproposals faced no obstacles to grant.

Petitioners attack Mr. Small's interests in MM Docket 98-112 merely for the purpose of "carv[ing]" an exception to an existing rule instantly. It is not Mr. Small which is the cause of Petitioners' woe in the instant proceeding, but the existence of the *Cui and Shoot* rule, and the attack on Mr. Small in the subject *Petition* was gratuitous and not mandatory as Petitioners now claim. Petitioners could have argued the applicability of the *Cut and Shoot* rule without attacking Mr. Small, or, after making the attack for the purpose of seeking an exception, Petitioners could have served Mr. Small rather than skulking in the dark.

11) In further dissembling, Petitioners claim that the instant proceeding and MM Docket 98-112 are "unrelated proceeding[s]." *Consolidated Opposition*, MM Docket 98-112, ¶ 9. In their next breath Petitioners argue that the two proceedings are related such that Mr. Small's activities in MM Docket 98-112 "had" to be discussed here. According to Petitioners, the two rule making proceedings are both related and unrelated, an inconsistency which, while not unexpected given their "say anything to win" approach, is not appropriate argumentation before the Commission.

### **C. The Misrepresentation Issue**

12) Mr. Small's *Opposition*, ¶¶ 20-22, argues that Petitioners have lied to the Commission by asserting that they placed detrimental reliance upon the staff's prior processing activities and that dismissing RSI's and Cox's counterproposals was a complete, and unfair, surprise. RSI's August 16, 2000 *Comments on Petition for Reconsideration* filed against Mr. Small in MM Docket 98-112 demonstrates that "RSI knew long before it filed its June 18, 2001 counterproposal in the captioned proceeding that its efforts to improve its own situation would be delayed by the rulemaking in MM Docket 98-112." *Opposition*, ¶ 21. For the purpose of the misrepresentation issue, it is irrelevant

that the Commission eventually granted RSI's application bearing File No. BPH-19991012AAG in August 2001 nearly two years after the application was filed." The misrepresentation issue turns on whether Petitioners' claim of detrimental reliance in the instant rulemaking proceeding was made in good faith and full candor after RSI had been explicitly advised by the staff that RSI's upgrade plans would face delay because of the lack of finality in MM Docket 98-112. That the application bearing File No. BPH-19991012AAG was eventually granted after a long delay does not diminish the fact that RSI was on notice that its upgrade plans were subject to delay nor the fact that petitioners have no basis to claim that the staff has unfairly injured them by dismissing the counterproposals in the instant proceeding.

13) Cox's position that Mr. Small's proposal MM Docket 98-112 should be denied in favor of WNNX's proposal is an interesting turn of events because Cox's position is 180° removed from the position it **took** in MM Docket 98-112. In MM Docket 98-112 Cox advised the Commission that

WNNX . . . failed to satisfy the Commission's requirements for a first local service preference, and, in any event, offered only minimal public interest benefits. Cox also demonstrated that the current arrangement of allotments in Anniston and College Park, as well as the allotment of the first competitive and first truly full-time service to the underserved community of Covington, Georgia, would ensure the fair, equitable and efficient distribution of radio stations in the region. Two other broadcasters – Preston W. Small, licensee of WLRR(FM), Milledgeville, Georgia ("WLRR") and Jefferson Pilot Communications Company ("Jefferson Pilot") – presented similarly compelling arguments to the same effect.

See September 15, 1998 *Reply Comments of Cox Radio, Inc.*, at 1. Now, rather than supporting Mr. Small's allocation proposal in MM Docket 98-112, Cox is filing illegal *ex parte* comments intended to deny Mr. Small even the right to prosecute the allocation scheme which Cox previously extolled.

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<sup>10</sup> Mr. Small has no information regarding why the staff apparently changed its mind and subsequently granted RSI's one-step upgrade application. However, RSI was clearly on notice that the lack of finality in MM Docket 98-112 was an issue which could delay its improvement plans and the grant of RSI's Form 301 application did not alter the *Cut and Shoot* rule applicable to rulemaking proceedings. See *Columbia City, FL*, 14 FCC Rcd. 21165 n. 1 (Alloc. Br. 1999) ("our policy is not to accept proposals that are dependent or contingent upon finality of other actions or proceedings. See *Cut and Shoot, Texas*, 11 FCC Rcd. 16383 (1996)").

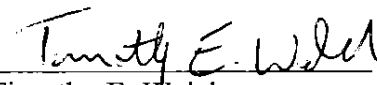
The Commission's goal in rulemaking proceedings is to distribute frequency allocations based upon the public interest, and not upon a private party's interest in self aggrandizement

14) While Cox's change of heart in the instant proceeding on who should prevail in MM Docket 98-112 could conceivably be due to reasons other than an intent to deceive the Commission, such as the parochial consideration of the contents of its own pocketbook, it is abundantly clear that the subject *Petition* was not tiled for the purpose of creating an allocation scheme in the public interest, the *Pelition* exists merely to serve petitioners' private, mutually shared hut undisclosed, interests. Even if Cox's palpably inconsistent statements do not rise to misrepresentation, Cox's turnaround amply demonstrates that the subject *Petition* was not filed in good faith with the public interest in mind and the *Pelition* should be denied

WHEREFORE, in view of the information presented herein and in the *Opposition*, it is respectfully submitted that the *Petition* be denied and that the Commission investigate whether Petitioners were involved in the filing a fraudulent lead petition for rulemaking in this proceeding and whether there are impermissible financial arrangements in place in MM Docket 01-104 which would disqualify WNNX, BSI, and Cox from the respective proceedings.

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Respectfully submitted,  
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\_\_\_\_\_  
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## CERTIFICATE OF SERVICE

I hereby certify that I have this 21<sup>st</sup> day of November 2002 served a copy of the foregoing  
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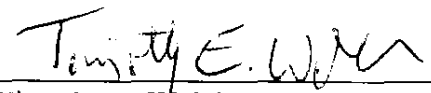
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